Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-996

ESTATE OF MICHAEL CARGILL,
RUSSELL CARGILL, ADMINISTRATOR,
APPELLANT,

v.

CITY OF ROCHESTER, NEW HAMPSHIRE,
APPELLEE.

JOHN MICHAEL MULCAHY,
BY HIS FATHER AND NEXT FRIEND, AND
JOHN J. MULCAHY, INDIVIDUALLY,
APPELLANT,

v.

CITY OF ROCHESTER, NEW HAMPSHIRE,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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Jurisdictional Statement

NOW COME the appellants, Estate of Michael Cargill, Russell Cargill, Administrator, John Michael Mulcahy, by

his Father and Next Friend, and John J. Mulcahy, Individually, and submit the following Jurisdictional Statement pursuant to Supreme Court Rule 13(2).

Opinion Below

The opinion of the New Hampshire Supreme Court has not been officially reported but is cited as *Mulcahy, et al.* v. *City of Rochester,* 119 N.H. ___, Case No. 78-277. A copy of the Opinion as distributed by the New Hampshire Supreme Court is marked "Appendix A", appended hereto, and made a part hereof.

Jurisdiction

The United States Supreme Court has jurisdiction over this appeal under 28 U.S.C. 1257(2).

1. These actions were originally brought in the Strafford County, New Hampshire Superior Court pursuant to New Hampshire RSA 491:22 as Petitions for Declaratory Judgments seeking a determination that New Hampshire RSA 507-B:4 (Supp. 1977) is unconstitutional as applied to the appellants and claiming denial of the equal protection of the laws and due process of law guaranteed to these appellants by the United States Constitution and the Constitution of the State of New Hampshire;

2. By judgment dated August 20, 1979, entered September 21, 1979, the New Hampshire Supreme Court held that New Hampshire RSA 507-B:4 (Supp. 1977) is not unconstitutional and remanded this case to the Strafford County, New Hampshire Superior Court.

3. Notice of Appeal was filed with the New Hampshire Supreme Court on October 16, 1979. A copy of that Notice of Appeal is marked "Appendix B", appended hereto, and made a part hereof.

4. The following cases sustain the jurisdiction of the United States Supreme Court over this appeal:

The appellants are entitled to appeal to the court as a matter of right under 28 U.S.C. 1257(2).

In *Hoffman* v. *Pursue, Ltd.,* 420 U.S. 592, 605, 43 L.Ed. 2d 482, 493, 95 S.Ct. 1200 (1975) the Court interpreted 12 U.S.C. 1257(2) as follows:

> "Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this court lies as a matter of right. 28 U.S.C. § 1257(2) (28 U.S.C.S. 1257(2))."

The appellants challenged the validity of New Hampshire RSA 507-B:4 (Supp. 1977) on federal constitutional grounds, and the decision of the New Hampshire Supreme Court sustained the validity of New Hampshire RSA 507-B:4 (Supp. 1977).

In their Petitions for Declaratory Judgment the appellants assert that New Hampshire RSA 507-B:4 (Supp. 1977) denies the appellants equal protection of the laws guaranteed by the United States Constitution. (Petitions for Declaratory Judgment, paragraphs 19 and 20) In their brief filed with the New Hampshire Supreme Court the appellants argued that New Hampshire RSA 507-B:4 (Supp. 1977) denies the appellants equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution—(Brief of the plaintiffs at 3-16). At oral argument the appellants argued that New Hampshire RSA 507-B:4 (Supp. 1977) denies the appellants both the equal protection of the laws and due process

of law guaranteed by the Fourteenth Amendment to the United States Constitution.

The New Hampshire Supreme Court ruled against the appellants on this federal question, specifically finding that New Hampshire RSA 507-B:4 (Supp. 1977) does not deny the appellants equal protection of the laws or due process of law. The appellants directly challenged the validity of a state statute on the grounds that it is repugnant to the Constitution of the United States. However, the New Hampshire Supreme Court ruled in favor of the statute's validity. Accordingly, jurisdiction lies under 28 U.S.C. 1257(2).

The New Hampshire Supreme Court decision is a "final judgment". Although the final order of the New Hampshire Supreme Court was to remand these cases for proceedings on the merits of the appellants' tort claims, the New Hampshire Supreme Court decision was a final judgment on the appellants' declaratory judgment actions. There will not be any further proceedings on the appellants' declaratory judgment actions so the New Hampshire Supreme Court decision is a "final judgment".

The Court has held that a declaratory judgment action which stems from a "definite and concrete (controversy), touching the legal relations of parties having adverse legal interest" presents a case or controversy subject to review in the United States Supreme Court. *Richardson* v. *Ramirez*, 418 U.S. 24, 35, 41 L.Ed. 2d 551, 560, 94 S.Ct. 2655 (1974) citing *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241, 81 L.Ed. 617, 57 S.Ct. 461, 108 ALR 1000 (1937). In *Aetna Life Insurance Co.* v. *Haworth, supra* at 300 U.S. 241-243 the court analyzed the nature of the controversy, the relation of the parties, and the relief sought in that case to determine whether there existed an actual case or controversy within the meaning of the Declaratory Judgment Act of 1934 (28 U.S.C. 2201).

Just as in *Aetna Life Insurance Co.* v. *Haworth, supra* the parties in the present case face each other in adversary proceedings. The appellants have each filed a civil suit against the appellee seeking damages in excess of the limit prescribed by New Hampshire RSA 507-B:4 (Supp. 1977). The appellee filed a Motion to Limit Ad Damnum in each case requesting the court to limit the appellants' ad damnums to $50,000, the limit prescribed by New Hampshire 507-B:4 (Supp. 1977). In order to place the constitutional issue raised by these pleadings before the court in advance of trial, and thereby facilitate settlement and perhaps avoid the expense and consumption of judicial resources required to try the appellants' tort claims on the merits, the appellants filed Petitions for Declaratory Judgment.

These Petitions request an adjudication of present rights grounded upon established facts. The legal consequences which flow from those established facts are disputed and the parties have taken adverse positions on those legal consequences. The controversy presented by these Petitions for Declaratory Judgment is identical to the controversy which would be presented were the appellants to appeal from a decision of the New Hampshire Supreme Court upholding New Hampshire RSA 507-B:4 (Supp. 1977) and sustaining a reduction in the appellants' recovery to $50,000. "It is the nature of the controversy, not the method of its presentation . . . that is determinative". *Aetna Life Insurance Co.* v. *Haworth, supra* at 300 U.S. 244.

Moreover, even if this appeal is analyzed in the context of the entire litigation between the appellants and the appellee, the New Hampshire Supreme Court decision is a final judgment, ripe for appellate review by the court. The New Hampshire Supreme Court has finally decided the only federal question to be raised in these proceedings, i.e., whether New Hampshire RSA 507-B:4 (Supp. 1977)

is repugnant to the United States Constitution. There will not be any further litigation of that issue in the state court. Unless the United States Supreme Court considers the appellants constitutional claims at this time, the appellants will be without a federal forum in which to litigate their federal constitutional claims.

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328, 95 S.Ct. 1029 (1975) the court held that the decision of the highest state court was a "final judgment" even though further proceedings in the lower state courts were to come.

> ". . . the court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in the particular case, but in which there are further proceedings in the lower State courts to come. There are now at least four categories of such cases in which the court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' *Radio Station WOW, Inc.* v. *Johnson*, *supra*, at 124, as well as precipitate interference with state litigation."

Cox Broadcasting Corp. v. *Cohn, supra* at 420 U.S. 477-478.

Although it is difficult to pigeonhole the present case into one of the four categories described by the court in

Cox Broadcasting Corp. v. *Cohn, supra*, the reasons for Supreme Court review of the cases listed in those categories are equally applicable to the present case. The federal issue has been finally determined by the state supreme court, and although further proceedings in the state lower courts are expected, the federal issue will not be raised again, and no other federal issues are anticipated. Immediate review by the court of this federal issue would make settlement of these cases a possibility, thereby avoiding the mischief of economic waste and conserving judicial resources. Moreover, if the court does not review these cases now the appellants may not have another opportunity to litigate this issue in a federal forum. If the cases are now returned to the trial court and the appellants recover in excess of $50,000 the trial court will reduce the appellants' judgment to $50,000 on the basis of New Hampshire RSA 507-B:4 (Supp. 1977) and the New Hampshire Supreme Court decision. The New Hampshire Supreme Court would almost certainly deny review both on the grounds of res judicata and because the New Hampshire Supreme Court may exercise its discretion not to accept an appeal. New Hampshire Supreme Court Rules 7, 25. Whether the appellants could appeal directly from the trial court to the United States Supreme Court following reduction of their verdict is unclear, because the appellants would inevitably face res judicata claims by the appellee and/or claims that the appeal is untimely because the New Hampshire Supreme Court decision was appealable.

Statutes Involved

New Hampshire RSA 507-B:4, Vol. 4-A (Supp. 1977) provides:

> "LIMIT OF LIABILITY. Liability of a governmental unit for bodily injury sustained by any one person in

actions brought under this chapter is limited to fifty thousand dollars. Such limit applies in the aggregate to any and all actions to recover for bodily injury arising out of bodily injury sustained by one person. The jury shall not be informed of such limit, but the court shall abate any verdict to the extent it exceeds the limit prescribed in this section. In actions consolidated under RSA 507-B:3, in the event the verdicts exceed the limit prescribed in this section, the verdicts shall be abated pro rata. Interest and costs may be recovered as in any civil action, in addition to the limit prescribed in this section."

A text of the complete chapter New Hampshire RSA 507-B is marked "Appendix C", appended hereto, and made a part hereof.

Questions Presented

The questions presented by this appeal are as follows:

Does New Hampshire RSA 507-B:4, which limits the appellants' rocovery for bodily injury caused by the tortious conduct of the appellee, City of Rochester, New Hampshire, to $50,000, deny the appellants the equal protection of the laws and/or due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

Statement of the Case

On August 6, 1975 appellants John Michael Mulcahy, age twelve, and Michael Cargill, age ten, went together to a public indoor swimming pool facility (for which admission is charged) owned and operated by the appellee, City

of Rochester, in the City of Rochester, New Hampshire. The pool building was not yet open when the boys arrived. They entered a small unlocked wooden storage shed on the appellee's property located approximately twenty feet from the pool building. An unsealed fifty-five gallon drum which it is believed contained methanol had been left in the shed. Curious about what was in the drum, one of the boys struck a match, the drum exploded and the two boys and the shed were immediately engulfed in flames. John Michael Mulcahy suffered second and third degree burns over approximately 65 percent of his body, and Michael Cargill suffered first, second and third degree burns over more than 60 percent of his body.

Michael Cargill died from the injuries he received in this explosion and fire on September 6, 1975. John Michael Mulcahy survived, but he suffers from permanent disfigurement, permanent physical and emotional handicaps and he still requires treatment for his burns. In addition to the foregoing, John Michael Mulcahy will prove that he has received medical services valued well in excess of $50,000.00.

On November 7, 1975, the Estate of Michael Cargill, by Russell Cargill, Administrator, and Russell Cargill, Father and Next Friend of Michael Cargill, instituted suit in Strafford County Superior Court against the appellee alleging, among other things, negligence, and seeking damages in the sum of $3,070,000.00. On November 13, 1975 John Michael Mulcahy, by His Father and Next Friend John J. Mulcahy, and John J. Mulcahy, on his own behalf, instituted suit in Strafford County Superior Court making similar allegations against the appellee and seeking damages in the sum of $5,000,000.00.

The appellee has no insurance applicable to these claims, and on the basis of RSA 507-B, the appellee filed a Motion to Limit Ad Damnum to $50,000.00 in each of those cases. Both Motions were denied.

Each appellant then filed a Petition for Declaratory Judgment against the appellee seeking a declaration that New Hampshire RSA 507-B (Supp. 1977), as applied to the appellants in these cases, is unconstitutional as a violation of the appellants rights under the Fourteenth Amendment to the United States Constitution and Part I, Articles First and Fourteenth of the Constitution of the State of New Hampshire. The appellee moved to dismiss each of these Petitions. The Strafford County, New Hampshire, Superior Court transferred the issues raised by those Petitions and Motions to Dismiss to the New Hampshire Supreme Court without a ruling.

An Agreed Statement of Facts was entered into by the appellee with appellant, Estate of Michael Cargill. Despite efforts by counsel (see Mulcahy's Motion of August, 1978 requesting the Court to accept Mulcahy's Statement of Facts) no agreement of the facts could be reached between appellant, John Michael Mulcahy and the appellee.

The New Hampshire Supreme Court held that New Hampshire RSA 507-B:4 does not violate the appellants' rights under the Fourteenth Amendment to the United States Constitution, stating:

> "The plaintiffs' second argument is that RSA 507-B:4 (Supp. 1977) denies them equal protection of the laws, in that it improperly creates different opportunities for recovery for victims of torts of the specified governmental units than for victims of private tortfeasors. The equal protection clause mandates that 'those who are similarly situated be similarly treated'." *Belkner* v. *Preston*, 115 N.H. 15, 17, 322 A.2d 168, 170 (1975); U.S. Const. Amend. XIV; N.H. CONST. pt. I, art. 1.
>
> ...
>
> "The plaintiffs have alleged that the $50,000 limitation of recovery violates due process because it is harsh and unreasonable compared to their alleged damages of $3,070,000 ad $5,000,000. The legislature does not have complete discretion to set 'any scale of compensation, however insignificant on the one hand or onerous on the other'. *New York Central R.R.* v. *White*, 243 U.S. 188, 205 (1917). Given the soaring costs of medical services, legal expenses, and other damages likely to be sustained by tort victims, we concede that a $50,000 statutory limitation on tort recoveries is precariously close to the boundary of acceptability. We are not prepared to say, however, that it is so severe as to be 'very wide of any reasonable line of demarcation'. *Opinion of the Justices*, 113 N.H. 205, 213, 304 A.2d 881, 887 (1973).

See Appendix A at 20, 24-25.

The Federal Questions Presented Are Substantial

The appellants have argued that New Hampshire RSA 507-B:4 (Supp. 1977) denies them due process of law because the limit of recovery for "bodily injury" against "governmental units" prescribed by the statute, $50,000.00 is arbitrary, bears no rational relation to any legitimate state purpose, and fails to provide a just substitute for the appellants' remedies which it replaces. These arguments were rejected by the New Hampshire Supreme Court. (See Appendix A at 22, 25). This issue has never been decided by the Supreme Court. Moreover, the court has specifically identified the constitutional problems and described the law as unclear.

In *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 61 L.Ed. 667, 37 S.Ct. 247 (1916) the court considered whether New York's workmen's compensation statutory scheme violated either the employer's or the employee's Fourth Amendment rights to due process and equal pro-

tection. Following a lengthy discussion of the effect of the New York statute on common law rights, specifically imposing strict liability on the employer in exchange for a limited, definite prescription of damages recoverable by injured employees, the court ruled the statute did not violate due process, stating:

> "Nor is it necessary for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . *it perhaps may be doubted whether the state could abolish all rights of action, on the one hand or all defenses, on the other, without setting up something adequate in their stead.* No such question is presented here, and we intimate no opinion about it. The statute sets aside one set of rules only to establish another in its place."
>
> *Supra* at 243 U.S. 201.
>
> "This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other would be supported. In this case no criticism is made on the ground that the compensation prescribed by the statute is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises." (Emphasis added)
>
> *Supra* at 243 U.S. 205, 206.

In *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 57 L.Ed. 2d 595, 98 S.Ct. 2620 (1978) the court considered a constitutional challenge to the Price-Anderson Act, 42 U.S.C. 2210 which limited the aggregate liability for a single nuclear incident to $500 million plus

available liability insurance on the grounds that the statute violated due process because it allowed injuries to occur without assuring adequate compensation and as a denial of equal protection. After discussing the common law rights affected by the statute and the practical limitation, if any, the statute placed on recovery for injuries, the court held the statute constitutional. Just as in *New York Central R.R. Co.* v. *White, supra,* the court did not consider or decide the federal issue raised in the present case. Moreover, the court indicated that the constitutional issue raised in the present case is unclear.

> "Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not decide this question here because the Price Anderson Act does, in our view, provide a reasonably just substitute for the common law or state tort law remedies it replaces."

Duke Power Company v. *Carolina Environmental Study Group, supra* at 438 U.S. 88.

A federal question is not substantial when prior decisions of the Supreme Court have clearly settled the law on the federal issue. *Zucht* v. *King*, 260 U.S. 194, 67 L.Ed. 194, 43 S.Ct. 24 (1922). As quoted above, the prior Supreme Court decisions on issues related to that presented here indicate the question has not been decided, that doubts exist about such a statute's validity, and that the law is unclear.

In *New York Central R.R. Co.* v. *White, supra* the court indicated that there exist "doubts" about the constitutionality of statutory limits on recovery which replace common law rights, but specifically did not address the question

of what amount of compensation is required. In *Duke Power Company* v. *Carolina Environmental Study Group, supra* the court stated that it is unclear whether Due Process requires that a legislatively enacted compensation scheme must provide a reasonable substitute for common law remedies, and, once again, specifically did not decide this question.

Moreover, not only has this federal issue specifically not been decided, New Hampshire RSA 507-B:4 (Supp. 1977) is more vulnerable to constitutional attack than the statutes presented in *New York Central R.R. Co.* v. *White, supra,* and *Duke Power Company* v. *Carolina Environmental Study Group, supra.* In both those cases the court reviewed the effect of the statutes on common law rights, noting that a benefit was conferred upon the injured party by the statute because strict liability was imposed upon the tortfeasors. In each case, this benefit was considered a reasonable trade-off for a limitation upon recovery. New Hampshire RSA 507-B:4 (Supp. 1977) provides no such trade-off. The injured victim receives no benefit of any kind from the statute. He or she must still prove all the common law elements of his or her tort claim, but is not entitled to common law damages.

Furthermore, in *Duke Power Company* v. *Carolina Environmental Study Group, supra* at 438 U.S. 84-94 the court discussed at length how the limitation contained in the statute, as a practical matter, presented no limitation at all because 1) the likelihood of injury was minimal; 2) the limitation on recovery was extremely high; 3) the statute guaranteed recovery and availability of funds to satisfy judgments up to the limit; and 4) Congress had indicated it would provide additional compensation should an incident occur causing damages in excess of the limitation. Unless that discussion was dicta, it is apparent that the amount of the recovery permitted is a relevant consideration when determining whether Due Process is violated by a statutory limitation on recovery. In the present cases there can be little doubt that the practical effect of the limitation on recovery is very real. The likelihood of injuries in excess of the statutory limitation is significant. The limitation on recovery is low, insufficient to reimburse most persons suffering serious injuries. The statute does not guaranty funds, nor is there any indication that the State of New Hampshire, or anyone else, will provide additional assistance to the injured person. New Hampshire RSA 507-B:4 (Supp. 1977), is not designed to rationally approximate injured persons' damages, nor was any attempt made to provide a reasonable substitute for common law remedies.

The appellants claim that New Hampshire RSA 507-B:4 (Supp. 1977) denies them due process of law because it arbitrarily limits their right to recovery of full civil damages for their injuries. The due process issues raised by the appellants have not been decided by the court. In two prior cases where similar issues were raised the court specifically did not decide the issue, but did indicate that there are "doubts" and that the law is "not at all clear". The issue presented pertains to fundamental rights of due process of law. The law on the issue is unclear. This case presents a substantial federal question.

Similarly the appellants' equal protection claims present a substantial federal question. In *Duke Power Company* v. *Carolina Environmental Study Group, supra* at 438 U.S. 93-94 the court noted that the equal protection attack in that case duplicated the due process issue, and that the "general rationality" of the Price Anderson Act, particularly the encouragement of the exploitation of nuclear energy, is ample justification for difference in treatment.

New Hampshire RSA 507-B:4 (Supp. 1977) has no such "general rationality". The limitation upon recovery serves no purpose besides allowing "governmental units" to

avoid the financial consequences of their tortious acts. Moreover, this purpose is not even served in a rational manner. New Hampshire RSA 507-B:4 (Supp. 1977) limits recovery for actions for "bodily injury". There is no limit on recovery for property damage caused by the negligence of "governmental units". The absurdity of this distinction is demonstrated by the following hypothetical: Assume that A owned a prize race horse which was grazing in a reasonable location adjacent to the wooden shed in which the appellants were seriously injured. Assume further that the fair market value of the horse was $500,000 and that the horse was killed as a result of the explosion which killed Michael Cargill and seriously injured appellant John Michael Mulcahy. If the explosition were caused by the city's negligence, A would be entitled to $500,000 damages, but the appellants are limited by RSA 507-B:4 (Supp. 1977) to $50,000 each. There is no rational basis for such difference in treatment, and the statute denies the appellants equal protection of the laws. See Dissent of Justice Douglas, Appendix A at 26-27.

Conclusion

WHEREFORE, the appellants pray that the Supreme Court of the United States take jurisdiction over this appeal.

ESTATE OF MICHAEL CARGILL,
RUSSELL CARGILL, Administrator,
and
JOHN MICHAEL MULCAHY, by His Father and Next Friend, and JOHN J. MULCAHY, individually,

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Counsel of Record

APPENDIX A

Strafford No. 78-277

ESTATE OF MICHAEL CARGILL
RUSSELL CARGILL, Administrator and
Father and Next Friend of
MICHAEL CARGILL
v.
THE CITY OF ROCHESTER

JOHN MICHAEL MULCAHY,
by his Father and Next Friend, and
JOHN J. MULCAHY, Individually
v.
THE CITY OF ROCHESTER

August 20, 1979
(distributed 9/21/79)

Snierson, Chandler & McKean, of Laconia, by brief for plaintiffs Cargill.

Holland, Donovan, Beckett & Welch, of Exeter (*Stephen G. Hermans* orally), for plaintiffs Mulcahy.

Fisher, Parsons, Moran & Temple, of Dover, and *William B. Cullimore*, of Farmington (*Mr. Cullimore* orally), for the city of Rochester.

BROCK, *J.* These companion petitions for declaratory judgment challenge the constitutionality of RSA 507-B:4 (Supp. 1977), which limits tort recovery from governmental units to $50,000 for bodily injuries sustained by one person.

In *Merrill* v. *City of Manchester*, 114 N.H. 722, 332 A.2d 378 (1974), this court prospectively abrogated the common law tort immunity of cities and towns. At that time we invited the legislature to take appropriate action. The legislature then enacted RSA ch. 507-B (Supp. 1977), effective July 1, 1975, defining and circumscribing the tort liability

of certain governmental units other than the state itself. The plaintiffs contend that the statutory limitation on recovery is unconstitutional. We disagree.

On August 6, 1975, John Michael Mulcahy, then age twelve, and Michael Cargill, then age ten, were playing in the vicinity of an indoor swimming pool owned and operated by the city of Rochester as part of a municipal park. They entered a small unlocked wooden storage shed on city property, approximately twenty feet from the pool building, which contained a covered but unsealed fifty-five gallon drum, alleged to have contained methanol. One of the boys lit a match, whereupon the drum exploded and the shed was engulfed in flames. Both boys suffered second and third degree burns over more than sixty percent of their bodies. Michael Cargill died on September 6, 1975, from these injuries. John Mulcahy suffered permanent physical disabilities and disfigurement and required extensive medical treatment.

In November 1975, John Mulcahy and the Estate of Michael Cargill filed actions in negligence and strict liability against the city of Rochester, seeking damages of several million dollars in each case. The city, which has no insurance applicable to these actions, does not claim municipal immunity. It asserts, however, that RSA 507-B:4 (Supp. 1977) limits its maximum liability in each case to $50,000. The plaintiffs brought these petitions for declaratory judgment, seeking a determination that RSA 507-B:4 (Supp. 1977) is unconstitutional. The Trial Court (*Mullavey*, J.) transferred the case without a ruling.

Our decision in *Merrill* v. *Manchester*, 114 N.H. 722, 332 A.2d 378 (1974) abolished the judicially created bar of municipal immunity for reasons of policy, not on constitutional grounds. At that time we indicated that "the legislature has authority to specify the terms and conditions of suit against cities and towns, *limit the amount of recovery,*

or take any other action which in its wisdom it may deem proper." *Id.* at 730, 332 A.2d at 384 (emphasis added). "Absent violation of constitutional rights, the legislature may control govenmental immunity." *Brown* v. *Wichita State Univ.*, 219 Kan. 2, 7, 547 P.2d 1015, 1021, *appeal dismissed*, 429 U.S. 806 (1976). *See also Hardin* v. *City of Devalls Bluff*, 256 Ark. 480, 483, 508 S.W.2d 559, 563 (1974).

The plaintiffs first contend that the statute violates part I, article 14 of the New Hampshire Constitution, which provides:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promtply, and without delay, conformably to the laws.

The purpose of part I, article 14 was to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts. *State* v. *Basinow*, 117 N.H. 176, 371 A.2d 458 (1977); 8 Bravenic, *The New Hampshire Bill of Rights in the Constitution of 1784 and the Treatment of Dissenters During the American Revolution*, 8 N.H.B.J. 244, 248 (1966).

This court has held that the rights guaranteed by part I, article 14 "are necessarily relative." *Sousa* v. *State*, 115 N.H. 340, 343, 341 A.2d 282, 284 (1975); *Opinion of the Justices*, 113 N.H. 205, 209, 304 A.2d 881, 885 (1973). The article does not prohibit all impairments of the right of access to the courts. *Compare State* v. *Cushing*, 119 N.H. , 399 A.2d 297 (March 7, 1979) with *State* v. *Basinow supra.*

Part I, article 14 does not guarantee that all injured persons will receive full compensation for their injuries.

Cf. Hackett v. *Perron,* 119 N.H. , , 402 A.2d 193, 195 (1979). Where there exist compelling public policy reasons, a person injured by the negligence of another is in some instances barred from recovery altogether. *See, e.g.,* RSA 508:12 (Supp. 1977). Similarly, the legislature has established limits on the amount of recovery in various actions, including medical malpractice, RSA 507-C (Supp. 1977), and wrongful death, RSA 556:13. We are not prepared to hold that all such limitations on the amount of recovery violate the constitutional rights of New Hampshire citizens. *See Sousa* v. *State supra*; *cf., Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59 (1978) (nuclear power plant accidents, U.S. CONST. amend. V); *New York Central R.R.* v. *White,* 243 U.S. 188, 201 (1917) (workmen's compensation).

The plaintiffs' second argument is that RSA 507-B:4 (Supp. 1977) denies them equal protection of the laws, in that it improperly creates different opportunities for recovery for victims of torts of the specified governmental units than for victims of private tortfeasors. The equal protection clause mandates that "those who are similarly situated be similarly treated." *Belkner* v. *Preston,* 115 N.H. 15, 17, 332 A.2d 168, 170 (1975); U.S. CONST. amend. XIV; N.H. CONST. pt. I, art. 1.

The threshold question is whether this state unreasonably distinguishes between persons who in fact constitute a "natural class." *See Reich* v. *State Highway Dep't,* 386 Mich. 617, 623, 194 N.W.2d 700, 702 (1972). From the city's perspective, the statute treats alike anyone with a bodily injury claim against it or against any other specified governmental unit. We could avoid any equal protection problem by defining a class so small that everyone within it receives equal treatment.

From the plaintiffs' perspective, however, the statute does distinguish between persons similarly, if not identically situated. *See Reich* v. *State Highway Dep't supra.* The plaintiffs here can easily demonstrate that, except for the fortuity of the identity of the tortfeasor, their situation is the same as if the explosion and fire had occurred on privately owned property. There is no question here of a plaintiff being treated differently because of his own status. *See, e.g., Levy* v. *Louisiana,* 391 U.S. 68 (1968). This statute affords certain plaintiffs different legal rights solely because of the identity or status of the defendant.

It is equally clear, however, that "there *are* real and vital differences between the situations of governmental units and of private parties as potential tort defendants." Cooperrider, *The Court, the Legislature, and Governmental Tort Liability in Michigan,* 72 Mich. L. Rev. 187, 272 (1973) (emphasis in original). The threat of tort liability acts as an incentive for persons engaged in various activities to take steps to reduce the risk of injuries. *See* Calabresi, *Optimal Deterrence and Accidents,* 84 Yale LJ. 656 (1975). In the public sector, citizens can participate in the decisions that create the risk of injuries, including the selection and disciplining of public employees. *See* RSA ch. 273-A; N.H. CONST. pt. I, art. 8 (Supp. 1977). In the private sector, in contrast, the ability of the general public to influence safety decisions or employee conduct is much more limited. A municipality's decision whether to purchase insurance that provides coverage above the statutory level, RSA 412:3 (Supp. 1977), can also be influenced by the views of its residents, the persons most in danger of sustaining bodily injuries as a result of the city's actions. Finally, a person who recovers judgment against one of the governmental units enumerated in the statute does not run the risk that no money will be available to pay the judgment. RSA 507-B:8 (Supp. 1977); RSA 412:3 (Supp. 1977). The question is whether these functional differences between govern-

mental units and other tortfeasors are sufficient to sustain the legislature's differential treatment of them.

The plaintiffs argue that RSA 407-B:4 must be subjected to "strict scrutiny" because it touches a fundamental right, namely the right to recover for one's injuries. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969). We cannot accept this analysis. "Virtually every state statute affects important rights." *Id.* at 661 (Harlan, J., dissenting). This court recently held that a statute limiting a person's ability to practice her profession, which for some purpose may be a "fundamental right," was to be evaluated using the less stringent "rational basis" test. *Richardson* v. *Brunelle,* 119 N.H. , 398 A.2d 838 (1979). In *State* v. *Piper,* 117 N.H. 64, 369 A.2d 199 (1977), we applied the "rational basis" test to a statute criminalizing the possession of certain weapons, despite the fact that such statutes "touch on" the right to bear arms. U.S. CONST. amend. II.

Finally, we held in *Belkner* v. *Preston,* 115 N.H. 15, 332 A.2d 168 (1975), concerning the limitations period for survival actions, RSA 556:10, that "[t]he procedural qualification of a citizen's access to the courts in civil matters" was not a "fundamental interest" triggering strict scrutiny. *Id.* at 18, 332 A.2d at 171. Where, as discussed above, the statute under consideration does not directly violate part I, article 14 of our constitution, we fail to see how it could violate the same constitutional provision indirectly under the guise of equal protection analysis. *See Duke Power Co.* v. *Carolina Envir. Study Group,* 438 U.S. 59, 93 (1978); *Shapiro* v. *Thompson,* 394 U.S. 618, 643 (1969) (Stewart, J., concurring).

Nor does RSA 507-B:4 create the type of suspect classification that demands strict scrutiny. Many laws "affect certain groups unevenly." *Personnel Adm'r* v. *Feeney,* 47 U.S.L.W. 4650, 4654 (June 5, 1979). Any statute that confers either benefits or burdens necessarily creates a class

of persons who may be worse off as a result of the legislation than they would have been without it. It has been said that "[e]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." *Village of Bell Terre* v. *Voraas,* 416 U.S. 1, 8 (1974). Absent invidious discrimination, however, the mere existence of a classification does not justify this court overturning the action of the elected legislature on equal protection grounds. *See Parham* v. *Hughes,* 47 U.S.L.W. 4457, 4458 (April 24, 1979). The class of persons who will at sometime find themselves burdened by this statutory limit on liability is essentially random. The members could not be determined at the time the statute was enacted or indeed at any time before each of them sustains a major injury. Because the statute does not abridge a fundamental constitutional right or adversely affect a suspect class, "the sole requirement is that the challenged classification rationally relates to a legitimate state interest." *Opinion of the Justices,* 117 N.H. 533, 537, 376 A.2d 118, 120 (1977); *see McGowan* v. *Maryland,* 366 U.S. 420, 426-28 (1961).

The legislature's goal in enacting RSA ch. 507-B in the wake of this court's decision in *Merrill* v. *Manchester,* 114 N.H. 722, 332 A.2d 378 (1974), was to define in a comprehensive manner the liability to which governmental units would be exposed, thus enabling cities and towns to plan for the risk of such liability. In enacting RSA 507-B:4, the legislature limited the financial strain to be imposed on certain governmental units by large judgments or high insurance premiums. The State "may legitimately attempt to limit its expenditures" or those of its subordinate units, so long as it does not create "invidious distinctions between classes of its citizens." *Shapiro* v. *Thompson,* 397 U.S. 618, 633 (1969); *Nadeau* v. *Helgemoe,* 561 F.2d 411, 417 (1st Cir. 1977). "[T]he wisdom and expediency

of statutes are not subject to judicial review." *Opinion of the Justices,* 117 N.H. 533, 536, 376 A.2d 118, 120 (1977).

It is argued that the limitation on recovery here is arbitrary and irrational when considered together with the different amounts available in actions against other government agencies. *See* RSA 110-A:81 (National Guard, $250); RSA 229:8-a (Supp. 1977) (state public works and highways, $300); RSA 541-B:12-14 (Supp. 1977) (State, $10,000, $20,000, or $50,000 depending on type of claim and legislative goodwill); RSA 491:8 (State, contracts, no limit). *Accord, Harvey* v. *Clyde Park District,* 32 Ill. 2d 60, 203 N.E.2d 573 (1965). It may still be true that the rules governing actions against governmental units are " 'as logical as those governing French irregular verbs.' " *Gossler* v. *City of Manchester,* 107 N.H. 310, 315, 221 A.2d 242, 245 (1966) (*Kenison,* C.J., dissenting). In enacting a particular statute, however, the legislature "may address itself to only that phase of a problem that appears most acute," *Opinion of the Justices,* 117 N.H. 749, 758, 379 A.2d 782, 788 (1977), even if the net result resembles a crazy quilt more than a carefully balanced sculpture. *See Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955). The equal protection clause does not require mathematical equivalence. *Richardson* v. *Brunelle,* 119 N.H. , , 398 A.2d 838, 840-41 (1979); *see Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

The plaintiffs have alleged that the $50,000 limitation on recovery violates due process because it is harsh and unreasonable compared to their alleged damages of $3,070,000 and $5,000,000. The legislature does not have complete discretion to set "any scale of compensation, however insignificant on the one hand or onerous on the other." *New York Central R.R.* v. *White,* 243 U.S. 118, 205 (1917). Given the soaring costs of medical services, legal expenses, and other damages likely to be sustained by tort victims, we

concede that a $50,000 statutory limitation on tort recoveries is precariously close to the boundary of acceptability. We are not prepared to say, however, that it is so severe as to be "very wide of any reasonable line of demarcation." *Opinion of the Justices,* 113 N.H. 205, 213, 304 A.2d 881, 887 (1973).

This court has already expressed its belief:

> That an individual injured by the negligence of the employees of a municipal corporation should bear his loss himself . . . instead of having it borne by the public treasury to which he and all other citizens contribute, offends the basic principles of equality of burdens and of elementary justice.

Merrill v. *City of Manchester,* 114 N.H. 722, 724, 332 A.2d 378, 380 (1974). We concur with President Abraham Lincoln that "[i]t is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administter the same between private individuals." First Annual Message, *quoted in Kenncott Copper Corp.* v. *State Tax Comm'n,* 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting). Absent constitutional violations, however, we are reluctant to substitute our judgment for that of the elected legislature regarding what constitutes a reasonable limitation on tort recoveries for bodily injury against governmental units. We urge the legislature to review periodically all statutory limitations of recovery, including the one at issue here, to insure that inflation and political considerations do not lead to inequitable disparities in treatment.

Accordingly, we hold that the $50,000 statutory limit on recovery against municipalities and other governmental subdivisions is not unconstitutional. *Accord, Consoli* v. *Municipio de San Juan,* 408 F. Supp. 384 (D.P.R. 1975) ($15,00/$30,000); *Seifert* v. *Standard Paving Co.,* 64 Ill. 2d 109, 355 N.E.2d 537 (1976) ($100,000); *State* v. *Silva,* 86

Nev. 911, 478 P.2d 591 (1971) ($25,000); *Sambs* v. *City of Brookfield*, 66 Wis. 2d 296, 224 N.W.2d 582 (1975) ($25,000); Wyo. Atty. Gen. Op. No. 79-003 (January 30, 1979); 47 U.S.L.W. 2525 (February 20, 1979).

Remanded.

DOUGLAS, J., *dissented*; the others concurred.

DOUGLAS, J., *dissenting.*

Equal protection of the laws mandates "that those who are similarly situated be similarly treated." *Belkner* v. *Preston*, 115 N.H. 15, 17, 332 A.2d 168, 170 (1975). The class of persons similarly situated are those who suffer injury to their life, liberty or property at the hands of a municipality or its agents. The New Hampshire Constitution equally guarantees to our citizens the "natural, essential, and inherent rights" of "life and liberty; acquiring, possessing, and protecting, property." N.H. Const. pt. I, art. 2. It makes no distinction or hierarchical scale of values for the three rights.

When a citizen is injured he seeks to vindicate those rights by recourse to the courts. If the injury by the municipality is to his *liberty* interests or civil rights, he may file suit for redress in our State courts against a municipality pursuant to 42 U.S.C. § 1983 (1976). *MBC, Inc.* v. *Engel*, 119 N.H. , 397 A.2d 636 (1979); *Monell* v. *Dept. of Social Services*, 436 U.S. 658 (1978). There is no dollar limit to recovery and any judgment will be paid by the municipality in full. RSA 31:106 (Supp. 1977). If a municipal water works or electric utility causes massive *property* damage, there is no limit to recovery under RSA 507-B. However, for some inexplicable reason, if *bodily* injury occurs due to the negligence of the municipality there is a fifty thousand dollar limit on recovery.

The Constitution provides equally for a remedy to citizens for injuries to "person, property or character." N.H. Const. pt. I, art. 14. No distinction is made based upon the nature of the injury, nor can the legislature constitutionally make such a distinction for the class of persons injured by municipalities. Because there is no rational basis for the bodily injury limit of RSA 507-B:4 (Supp. 1977), it violates equal protection of the laws. *See Harvey* v. *Clyde Park District*, 32 Ill. 2d 60, 203 N.E.2d 573 (1965). The legislature seems to be saying to our citizens that it values their persons *less* than it does their property or character. Such a distinction to me is patently a violation of N.H. CONST. pt. I, art. 2 and 14.

APPENDIX B

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Strafford No. 78-277

ESTATE OF MICHAEL CARGILL
RUSSELL CARGILL, Administrator and
Father and Next Friend of
MICHAEL CARGILL
v.
THE CITY OF ROCHESTER

JOHN MICHAEL MULCAHY,
by his Father and Next Friend, and
JOHN J. MULCAHY, Individually
v.
THE CITY OF ROCHESTER

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that the Estate of Michael Cargill, Russell Cargill, Administrator and Russell Cargil, Father and Next Friend of Michael Cargill and John Michael Mulcahy, by his Father and Next Friend, and John J. Mulcahy, individually, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Hampshire, entered in this action on September 21, 1979, holding that New Hampshire RSA 507-B:4 (Supp. 1977) does not violate any of the appellants' rights under the United States Constitution and remanding the above named cases to the Superior Court for the County of Strafford, State of New Hampshire.

II. This appeal is taken pursuant to 28 U.S.C. 1257(2).

III. The Clerk is requested to prepare a transcript of the entire record in these cases for certification and transmission to the Clerk of the Supreme Court of the United States.

ESTATE OF MICHAEL CARGILL,
RUSSELL CARGILL, Administrator and
Father and Next Friend of
MICHAEL CARGILL
By Their Attorneys
SINERSON, CHANDLER & MCKEAN
By: EDGAR D. MCKEAN, III
EDGAR D. MCKEAN, III

JOHN MICHAEL MULCAHY
By His Father and Next Friend, and
JOHN J. MULCAHY, Individually
By Their Attorneys
HOLLAND, DONOVAN, BECKETT & WELCH
By: STEPHEN G. HERMANS
STEPHEN G. HERMANS

PROOF OF SERVICE

I, Stephen G. Hermans, attorney for appellants, John Michael Mulcahy, by his Father and Next Friend, and John J. Mulcahy, individually, hereby certify that I deposited copies of the above Notice of Appeal to the Supreme Court of the United States in a United States Mailbox first class postage prepaid addressed to William B. Cullimore, 14 South Main Street, P.O. Box 565, Farmington, New Hampshire, 03835, counsel of record for the appellee, City of Rochester, and to Edgar D. McKean, III, counsel of record for appellants, Estate of Michael Cargill, Russell Cargill, Administrator and Father and Next Friend of Michael Cargill.

October 16, 1979

(s) STEPHEN G. HERMANS
STEPHEN G. HERMANS

STATE OF NEW HAMPSHIRE, COUNTY OF ROCKINGHAM

Subscribed and sworn to, before me, this 16th day of October, 1979.

(s) WILLIAM H. M. BECKETT
Notary Public
Justice of the Peace

APPENDIX C

NEW HAMPSHIRE RSA, CHAPTER 507-B
Bodily Injury Actions Against Governmental Units

507-B: 1 Definitions. In this chapter:

I. "Governmenal unit" means any political subdivision within the state including any county, city, town, precinct, school district, supervisory union or departments or agencies thereof, or any other body corporate and politic within the state, but does not include the state or any department or agency thereof.

II. "Action to recover for bodily injury" means an action arising out of bodily injury, including an action brought under RSA 556:9-14, whether brought by or on behalf of the person actually sustaining bodily injury or brought by any other person to whom rights may accrue arising out of such injury, regardless of the nature of the damages claimed.

507-B: 2 Liability for Negligence. A governmental unit may be held liable for damages in an action to recover for bodily injury caused by its fault or by fault attributable to it, arising out of ownership, occupation, maintenance or operation of the following:

I. All premises, except public sidewalks, streets, highways or publicly owned airport runways and taxiways.

II. All motor vehicles.

507-B: 2a Municipal Immunity. Notwithstanding RSA 507-B:2, no city, town or other governmental unit shall be held liable for any injury to person or damage to property or both arising from an accident the result wholly or in part of inclement weather.

507-B: 3 Compulsory Consolidation of Actions. All actions to recover for bodily injury arising out of bodily

injury to one person shall be tried together, and not otherwise.

507-B: 4 Limit of Liability. Liability of a governmental unit for bodily injury sustained by any one person in actions brought under this chapter is limited to fifty thousand dollars. Such limit applies in the aggregate to any and all actions to recover for bodily injury arising out of bodily injury sustained by one person. The jury shall not be informed of such limit, but the court shall abate any verdict to the extent it exceeds the limit prescribed in this section. In actions consolidated under RSA 507-B: 3, in the event the verdicts exceed the limit prescribed in this section, the verdicts shall be abated pro rata. Interest and costs may be recovered as in any civil action, in addition to the limit prescribed in this section.

507-B: 5 Effect on Common Law. No governmental unit shall be held liable in any action to recover for bodily injury except as provided by this chapter or as is provided or may be provided by other statute.

507-B: 6 Property Exempt from Attachment. No property, either real or personal, of the governmental unit shall be subject to attachment or execution to secure payment of or to satisfy any judgment entered against the governmental unit under this chapter.

507-B: 7 Limitation on Actions. No actions shall be maintained against the governmental unit under this chapter unless the same is commenced within four years after the time of injury; provided, however, that as a condition precedent thereto the clerk of the governmental unit shall be notified by registered mail within sixty days after said injury as to the date, time and location where said injury occurred and provided that in any case where lack of written notice, actual knowledge or reasonable opportunity to obtain knowledge of any injury within said sixty day period is alleged by the governmental unit, the burden of proof

shall be on the governmental unit to show that it was substantially prejudiced thereby.

507-B: 8 Appropriation to Satisfy Judgment. Upon entry of final judgment against the governmental unit in any action brought under this chapter, the body charged with the appropriation of funds for the governmental unit shall provide funds through insurance or otherwise to satisfy said judgment within a reasonable time.

Supreme Court, U.S.
FILED
FEB 13 1980
MICHAEL RODAK, JR., CLERK

No. 79-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ESTATE OF MICHAEL CARGILL,
RUSSELL CARGILL, ADMINISTRATOR,
Appellant,

v.

CITY OF ROCHESTER, NEW HAMPSHIRE,
Appellee.

JOHN MICHAEL MULCAHY,
By His Father and Next Friend, and
JOHN J. MULCAHY, Individually,
Appellant,

v.

CITY OF ROCHESTER, NEW HAMPSHIRE,
Appellee.

On Appeal from a Judgment of the Supreme Court of the State of New Hampshire

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MOTION TO DISMISS

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IN THE

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No. 79-996

ESTATE OF MICHAEL CARGILL,
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Appellee.

On Appeal from a Judgment of the Supreme Court of the State of New Hampshire

---

MOTION TO DISMISS

Pursuant to Rule 16(1)(b), the appellee City of Rochester moves to dismiss this appeal on the ground

that it raises no substantial federal question and that, in any event, the lower court's resolution of the issues under federal law was plainly correct.

STATEMENT

In 1974 the Supreme Court of New Hampshire declared that the State's municipalities should no longer be completely immune from tort liability.[1] *Merrill* v. *City of Manchester*, 114 N.H. 722, 332 A.2d 378 (1974). Prior to *Merrill*, sovereign immunity generally was "deeply entrenched" in New Hampshire's jurisprudence.[2] Immunity for the State's cities and towns dated back to at least 1821,[3] and as recently as 1966 the State's Supreme Court had expressly refused to abolish it, observing that to do so would "thrust upon them a potentially catastrophic financial burden." *Gossler* v. *City of Manchester*, 107 N.H. 310, 221 A.2d 242, 245 (1966).

Recognizing the potentially drastic impact of its decision in *Merrill*, the New Hampshire Supreme Court delayed its effective date some seven months "[t]o permit the legislature to take action in regard to the [resulting] social and economic factors," and to permit the affected cities and towns time to make the necessary financial

[1] "We hold that the immunity from tort liability heretofore judicially conferred upon cities and towns is hereby abrogated except for the following exception. They are immune from liability for acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Merrill* v. *City of Manchester*, 114 N.H. 722, 332 A. 2d 378, 383 (1974).

[2] *Krzysztalowski* v. *Fortin*, 108 N.H. 187, 230 A.2d 750, 751 (1967): "[T]he solid fact [is] that neither the Legislature nor this court is committed to the abrogation of governmental immunity for torts." *Id.*, at 752.

[3] *Farnum* v. *Town of Concord*, 2 N.H. 392 (1821).

arrangements. 221 A.2d at 384. In so doing, it expressly acknowledged the continuing authority of the legislature "to specify the terms and conditions of suit against the cities and towns, limit the amount of recovery, [and] take any other action which in its wisdom it may deem proper." *Id.*

Thereafter, the New Hampshire legislature enacted the statute here under attack. Entitled "Bodily Injury Action Against Governmental Units," the provision allows certain "governmental units," including cities and towns but not including the State or its departments and agencies,[4] to be sued for negligently inflicted "bodily injury." The amount recoverable is limited to $50,000. New Hampshire RSA, Chapter 507-B (Supp. 1977). The foregoing act became effective on July 1, 1975, the effective date established by the Supreme Court in *Merrill*. The exposure of New Hampshire's cities and towns to tort liability thus *began* with a monetary limit on the amount recoverable.[5]

[4] The *Merrill* decision did not affect the immunity of the State. 332 A.2d at 384. Since 1951 the State legislature had permitted suits against the State for breach of contract with no limits on liability. RSA 491:8. Attempts to extend the coverage of this statute to torts had failed, however. *Krzysztalowski* v. *Fortin*, *supra*. Effective July 1, 1977, the New Hampshire legislature established an expanded procedure for making claims against the state. RSA 541-B:1, *et seq.* (Supp. 1977). At present, liability for torts committed by the state is, like that for cities and towns, limited to $50,000. *Id.*

[5] Prior to *Merrill*, New Hampshire's municipalities had apparently sometimes been held liable for torts committed in the course of the performance of their "proprietary" activities. *See Merrill* v. *City of Manchester*, *supra*, 332 A.2d at 381, and cases there cited. Appellants, however, make no contention that their injuries would have been fully recoverable prior to the enactment of RSA 507-B on the theory that the city's activities in this case were "proprietary." Indeed, it would appear that New Hampshire law on this point is settled against them. *Harkinson* v. *City of Manchester*, 90 N.H. 554 5 A.2d 721 (1939); *Allen* v. *Manchester*, 99 N.H. 388, 111 A. 2d 817 (1955).

The accident which gave rise to this appeal occurred on August 6, 1976 at a Municipal pool operated by the City of Rochester. It resulted in the death of one boy and the serious injury to another. The accident was allegedly the result of negligence on the part of employees or agents of the City of Rochester. Litigation was commenced in November of the same year, with both Appellants claiming damages substantially in excess of the statutory limit. Thereafter, both Appellants initiated separate declaratory judgment actions contending that the statutory limitation on liability was unconstitutional.[6]

The only federal claim advanced by the Appellants in their Petitions for Declaratory Judgment and in their brief to the New Hampshire Supreme Court was that the liability limitation denied them the equal protection of the law secured by the Fourteenth Amendment to the U.S. Constitution (Jurisdictional Statement, pp. 3-4). At oral argument, Appellants for the first time advanced the argument that their federal rights under the Due Process Clause were also violated by the statute. *Id.* The State court upheld the constitutionality of RSA 507-B, and this appeal followed.

QUESTION PRESENTED

Whether the Fourteenth Amendment inhibits the States in defining and limiting the tort liability of their political subdivisions.

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[6] The judgment here appealed simply holds the state statute constitutional. Though this judgment is of considerable practical value to the parties as an incentive to settlement, and its interlocutory nature is presumably consistent with State procedural rules, the fact remains that neither the City's liability nor the Appellants' damages have yet been adjudicated. Under these circumstances there is a serious question whether this is a "final judgment" under the principles announced in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

ARGUMENT

I. LONG ESTABLISHED FEDERAL JURISPRUDENCE PROTECTS THE RIGHT OF THE STATES AND THEIR SUBDIVISIONS TO DEFINE AND LIMIT THEIR SUSCEPTIBILITY TO SUIT.

Appellants' contentions that the Fourteenth Amendment may be used to expand the exposure of the States or their political subdivisions to tort liability runs in the teeth of long-settled principles of federal jurisprudence. Whether and under what conditions a state or its political subdivisions may be sued has consistently been recognized by this Court as a matter peculiarly for the States themselves to decide, and not a matter to be decided through construction of the Due Process and Equal Protection Clauses of the federal Constitution. "The right of individuals to sue a state, in either a Federal or a state court, cannot be derived from the constitution or laws of the United States. It can come only from the consent of the state." *Palmer* v. *Ohio*, 248 U.S. 32, 34 (1918). Moreover, once granted, the consent of the state may be later withdrawn or qualified without constitutional inhibition. *Beers* v. *State of Arkansas*, 61 U.S. 527, 20 How. 527 (1858).[7]

Quite contrary to the contentions necessarily advanced by the Appellants, federal concern for State immunity

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[7] As the Court said in *Beers*:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is all together voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Id.*

from suit dates from the beginning of the Republic. This Court's conclusion in 1793 [8] that the States could be sued in federal court resulted, five years later, in passage of the Eleventh Amendment forbidding such suits as a matter of constitutional law. *See, Edelman* v. *Jordan,* 415 U.S. 615, 662 (1974); Prosser, *Law of Torts* 975 (4th Ed. 1971). This Court has always been mindful of the protections extended to the States and their treasuries by the Eleventh Amendment. *See, e.g., Edelman* v. *Jordan, supra*; *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459 (1945); *Hans* v. *Louisiana,* 134 U.S. 1 (1890); *Duhne* v. *New Jersey,* 251 U.S. 311 (1920). It has also stressed that there are "limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce." *National League of Cities* v. *Usery,* 426 U.S. 833, 842 (1976).

In short, to the extent there is a federal interest in the exposure of a State or municipality to tort liability, it runs against the Appellants' contentions. We do not, of course, contend that State and municipal immunity from tort liability is affirmatively protected by the federal Constitution. But long-established federal precedent protects the right of the States and their political subdivisions to determine the extent, if any, of their liability to suit. *See Krause* v. *State,* 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972), appeal dismissed, 409 U.S. 1052, rehearing denied, 410 U.S. 918; *Crowder* v. *Department of State Parks,* 228 Ga. 436, 185 S.E. 2d 908, appeal dismissed, 406 U.S. 914 (1972); *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P. 2d 66, appeal dismissed, 429 U.S. 806 (1976); *Perry* v. *Kalamazoo State Hospital,* 404 Mich. 205, 273 N.W. 2d 421, appeal dismissed, —— U.S. ——, 48 U.S.L.W. 3186 (Oct. 1, 1979).

Two cases decided just this Term confirm the foregoing proposition in unmistakeable terms. In *Martinez* v. *Cali-*

[8] *Chisholm* v. *Georgia,* 2 Dall 419, 1L Ed 440.

fornia, —— U.S. ——, 48 U.S.L.W. 4076 (Jan. 15, 1980), a case involving a suit by the estate of a woman raped and murdered by a parolee, the Court upheld a California statute granting absolute immunity to public employees who make parole determinations. The court spoke in terms directly responsive to the arguments here advanced by the Appellants:

> Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. *But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.* 48 U.S.L.W. at 4077. (Emphasis supplied.)

The Court thus recognized that the rules of tort law themselves, whoever is the defendant, is a matter of state law largely unaffected by constitutional considerations.

In *Ferri* v. *Ackerman,* —— U.S. ——, 48 U.S.L.W. 4054 (Dec. 4, 1979) the Court reversed a decision of the Pennsylvania Supreme Court holding that lawyers appointed to represent indigent defendants under the federal Criminal Justice Act were immune under that Act from malpractice suits. The state court holding presented the question "whether federal law in any way pre-empts the freedom of a State to decide the question of immunity . . . in accord with its own law." 48 U.S.L.W. at 4055. In deciding that the Criminal Justice Act did not so limit the State, the Court stressed that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity . . ." *Id.*

II. THE NEW HAMPSHIRE STATUTE HERE UNDER ATTACK DOES NOT OFFEND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants claim that the statutory limit on liability denies them a constitutionally protected right to full recovery for their injuries. Relying on some inferences drawn from this Court's decisions in *New York Central R.R. Co.* v. *White*, 243 U.S. 188 (1916) and *Duke Power Company* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), Appellants contend that the Due Process Clause prohibits a state from eliminating a common law right without replacing it with an adequate substitute. As we have shown, these contentions run against the long-established right of the States to determine for themselves the extent to which they and their subdivisions may be sued. They also fail under conventional Due Process analysis.[9]

In the first place, Appellants' arguments depend upon their claim that prior to the passage of RSA 501-B, they had a common law right to recover damages from the City of Rochester for negligently inflicted injuries. The reverse is true. As the *Merrill* case makes clear, Appellants would have had no rights whatsoever to recover against the City prior to that decision. The New Hampshire legislature took away no rights when it enacted RSA 507-B in response to the *Merrill* decision. Rather it created and defined for the first time the right to recover

[9] Though Appellants' Jurisdictional Statement concentrates on their Due Process Arguments, these contentions were not briefed before the New Hampshire Supreme Court. It appears, moreover, that the State court did not pass on the federal Due Process claim, though it did not expressly refuse to do so. (Jurisdictional Statement, pp. 24-25.) It is clear that the dissenting judge below relied entirely on state grounds. (*Id.* at 26-27.) There is, therefore, a serious question whether or not the Due Process issue is properly before this Court. *See Silver* v. *Silver*, 280 U.S. 117 (1929); *Street* v. *New York*, 394 U.S. 576, 582 (1969).

damages for bodily injuries attributable to the state's cities and towns.[10]

More fundamentally, Appellants appear to misapprehend the nature of the rights protected by the Due Process Clause. Generally speaking the Due Process Clause does not extend its protections to "potential" or inchoate rights. *See Keller* v. *Dravo Corp.*, 441 F. 2d 1239, 1242 (5th Cir. 1971). Rather, it protects "*interests that a person has already acquired in specific benefits.*" *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972). Had the Appellants been injured at a time when the state's laws entitled them to full recovery, and had the legislature thereafter enacted legislation limiting their right to recovery, a more difficult question might have been presented. But that is a not this case.

Appellants seem to advance the long-discredited notion that an individual has a constitutionally protected interest in the legal *status quo*. But "[a] person has no property, no vested interest in any rule of the common law . . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature . . ." *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876).[11] And this Court's "cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets other-

[10] See note 5, *supra*.

[11] In upholding a state guest statute, sharply limiting the right of an automobile passenger to recover damages arising out of the negligence of his host driver, the Court spoke of the "rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver* v. *Silver*, 280 U.S. 117 (1929). *Cf. Carr* v. *United States*, 422 F. 2d 1007, 1010 (4th Cir. 1970); *Clarke* v. *Storchak*, 384 Ill. 564, 52 N.E. 2d 229 (1943), appeal dismissed, 322 U.S. 713 (1944).

wise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

Appellants' reliance on *New York Central* v. *White*, *supra*, is misplaced. In that case this Court upheld New York State's newly enacted workers' compensation law in the face of a variety of constitutional objections advanced by employers. In doing so the Court repeatedly stressed the notion that settled "rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state." 243 U.S. at 199. The Court's speculation, relied on by Appellants, that a state might not be entirely free to "suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute," was made in contemplation of New York's "vast industrial organization," set up "in reliance upon the probable permanence of an established body of law governing" the relationships involved—especially the employer-employee relationship. Those factual concerns have no relevance in this context; and the Court's dictum in *White* cannot, accordingly, serve to breathe life into this controversy.

Moreover, even if the Court's speculation in *White* were factually opposite, it was made at a time when the Due Process Clause was regularly employed to strike down state and federal legislation on substantive grounds. That time is long past. *See Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).[12] "It is by now well established that legislative

[12] In the words of Justice Holmes, approved by the Court in *Ferguson* v. *Skrupa*, 372 U.S. at 729:

> [A] state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the . . . Court may happen to entertain.

Tyson & Brother—United Theatre Ticket Officers v. *Banton*, 273 U.S. 418, 445 (1927) (dissenting opinion).

acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 15.

Appellants' reliance on this Court's relatively recent decision in *Duke Power Company* v. *Carolina Environmental Study Group*, *supra*, is even more tenuous. Under attack in that case was the Price Anderson Act, an act of *Congress* which effectively abrogated state laws of tort liability in all instances involving potential claims against *private* nuclear power companies. Enacted as a device to encourage the private development of nuclear power, the Act established a claims procedure and an aggregate limit on monetary liability. After disposing of very difficult issues of jurisdiction and standing, the Court faced an issue very different from that presented in this appeal: the extent of *Congress'* power to drastically tamper with state law remedies against an important and potentially dangerous segment of private industry.

This Court upheld the Price Anderson Act as a valid exercise of Congress' power to enact economic legislation. It also rejected the contention that the Act failed to provide a "satisfactory quid pro quo for the common-law rights of recovery which the Act abrogates." 438 U.S. at 88. In doing so, however, the Court expressed considerable skepticism that the "Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.*, and see n. 32. Appellants stress this language in their Jurisdictional Statement, arguing that it confirms the presence here of substantial and unresolved federal questions. But the Court's language more readily supports the opposite conclusion.

III. THE NEW HAMPSHIRE STATUTE HERE UNDER ATTACK DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants' contentions that the limit on liability denies them Equal Protection are equally insubstantial and without merit. In their Jurisdictional Statement Appellants argue that by failing to impose a limit on the cities' liability for property damage the legislature has invidiously discriminated against those plaintiffs who suffer severe bodily injury. They also argued below that the resulting discrimination between those plaintiffs who are injured by the cities and towns and those who are injured by private tortfeasors denies Equal Protection. Both claims are clearly without substance.

The Court below was plainly correct in holding that the legislation in question touched no "fundamental right" within the context of Equal Protection analysis. Unless the legislation in question touches on one of the traditional "suspect" categories, *See, e.g., McLaughlin* v. *Florida*, 379 U.S. 184, or directly infringes a constitutional right, *Dunn* v. *Blumstein*, 405 U.S. 330, 335 (1972), the classifications it creates need only be rationally related to a lawful state objective. This proposition was reiterated by the Court just last Term in *Parham* v. *Hughes*, —— U.S. ——, 47 U.S.L.W. 4457 (April 24, 1979)

> State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. 47 U.S.L.W. at 4458. (Citations omitted.)

Put more pungently, "[m]isguided laws may nonetheless be constitutional." *James* v. *Strange*, 407 U.S. 128, 133 (1972).[13]

The law in question plainly bears a "rational relationship to a permissible state objective." The State has a clear interest in balancing the well-being of its individual citizens against the financial stability of its cities and towns. This legislation constitutes a reasonable attempt to strike a part of that balance. Other states might do it differently, but there is nothing in the Fourteenth Amendment which requires a different approach.

CONCLUSION

For the foregoing reasons, appellee City of Rochester respectfully submits that the appeal should be dismissed.

Respectfully submitted,

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[13] *See also McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961):

> "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objectives. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.